IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O. NO. 628 OF 2006

Mohammedbhai Nanbhai Bhartoo ... Appellant
VS.
Municipal Corporation of Greater Mumbai
& anr. ... Respondents

Mr. A. Y. Sakhare, Sr. Counsel with R. A. Thorat and P.J. Thorat for appellant.
Ms. Geeta Joglekar for BMC.
Mr. V.J. Hegde for respondent no.2.

CORAM: D. G. KARNIK **J.**

DATE: 18th September, 2006

P.C.:

1. Heard learned counsel for the parties.

2. This appeal is directed against the order dated 16th August 2006 passed by the City Civil Court, Mumbai dismissing Notice of Motion No. 1728 of 2005.

3. This appeal is one more attempt by the appellant to get an injunction restraining the respondent Municipal Corporation from demolishing the unauthorized structure which he has erected and has been able to retain for a number of years. This can be seen from the facts which are narrated below.

4. A notice under section 351 of the Bombay Municipal Corporation Act, 1888 (which is subsequently renamed as Mumbai Municipal Corporation Act 1888 and hereinafter referred to as "the Act") was issued to the plaintiff in the year 1988. After giving an opportunity of being heard to the appellant by an order dated 11th September 1990 the Deputy Municipal Commissioner directed the removal of the suit structure. The appellant thereafter filed a suit in which a motion was taken out for injunction restraining the respondent no.1 from demolishing the suit structure. That motion was dismissed. Appeal from that order preferred by the appellant in this court was also dismissed by this court on 17th April 1989. Respondent no.1 Municipal Corporation, thereafter, ought to have demolished the suit structure. However apart from issuing of a notice and passing of the order of removal of the unauthorized structure the respondent no.1 did nothing further. In the meanwhile the respondent no.2, landlord, was moving the Municipal Corporation again and again for demolition of the suit structure. Since considerable time had passed between the earlier order of demolition the respondent no.1 chose to issue a fresh notice under section 351 of the Act on 13th January 2004. On 23rd April 2005 after hearing the appellant, the respondent no.1 again passed an order directing the removal of the suit structure.

5. On 4th May 2005, the appellant filed a suit bearing L. C. Suit no. 2007 of 2005 in the City Civil Court for an injunction restraining the respondent no.1 from demolishing the suit structure. In the said suit, the appellant took out a Motion bearing Notice of Motion No. 1728 of 2005, for injunction restraining the respondent no.1 from demolishing the suit structure. By an order dated 4th May 2005 the said City Civil Court refused to grant interim relief and rejected the motion. Appeal, bearing No. 611 of 2005, filed by the appellant against the order of the City Civil Court rejecting the motion was also dismissed by this court by an order dated 10th May 2005.

6. After the dismissal of the appeal bearing No. A. O. No. 611 of 2005, one would have expected respondent no.1 to act immediately and demolish the illegal structure as it had passed orders of demolition on two earlier occasions. However, it appears that the respondent no.1 did not take any action of demolition but allowed the structure to stand. It appears that thereafter the appellant again moved the City Civil Court for a relief of injunction in the very suit after amending the plaint. Ad interim relief was granted. However, after hearing the parties by an order dated 16th August 2006 the learned Judge of the City Civil Court dismissed the motion and vacated the ad interim relief. That order is impugned in this appeal.

7. Learned counsel for the appellant submitted that in respect of the very structure which is the subject matter of the suit the Corporation had earlier issued two notices under section 351 of the Act on 25th May 1979 and 2nd April 1988. However no action was taken. Since no action was taken on the two earlier notices under section 351 in respect of the very same structure the respondent was not entitled to a third notice and therefore the appellant was entitled to an injunction. In my view the submission is without merit. The appellant had challenged the second notice dated 2nd April 1988 issued under section 351 of the Act by filing a suit. The motion taken out in the said suit was dismissed. The suit was also dismissed. As stated earlier, after dismissal of the motion the respondent no.1 ought to have taken action in pursuance of the previous notice dated 2nd April 1988. However, no action was taken. Long time had lapsed. Fresh notice under section 351 was issued on 13th January 2004. Previous suit challenging the previous notice in respect of the same suit structure was dismissed. In view thereof filing of a second suit after fresh notice and order, in my view, amounts to abuse of process of law.

8. In any event the order passed by the respondent on 23rd April 2005 does not suffer from any infirmity. It was passed after issuing notice and after granting adequate opportunity of

hearing to the appellant. Learned counsel for the appellant was unable to show any infirmity in the order.

9. In these circumstances there is no merit in the appeal which is hereby dismissed. I hope, at least after dismissal of this appeal, the Corporation would act expeditiously and to take action in pursuance of its order of demolition.

(D.G. KARNIK J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Civil application No. 830 of 2006
in
A.O. NO. 628 OF 2006

Mohammedbhai Nanbhai Bhartoo ... Applicant
VS.
Municipal Corporation of Greater Mumbai
& anr. ... Respondents

Mr. A. Y. Sakhare, Sr. Counsel with R. A. Thorat and P.J. Thorat for applicant .
Ms. Geeta Joglekar for BMC.
Mr. V.J. Hegde for respondent no.2.

CORAM: D. G. KARNIK **J.**

DATE: 18th September, 2006

P.C.:

In view of the disposal of the appeal this Civil application does not survive and is disposed of.

(D.G. KARNIK J.)